FOR ARGUMENT

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IN THE

Supreme Court Of The United States

October Term, 1986

UNITED STATES OF AMERICA,
Petitioner

v.

PHILLIP PARADISE, JR., et al.,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE CITY OF BIRMINGHAM, ALABAMA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Counsel of Record

JAMES K. BAKER
City Attorney
CITY OF BIRMINGHAM
600 City Hall
Birmingham, AL 35203
(205) 254-2372

JAMES P. ALEXANDER
RICHARD H. WALSTON
GREGORY H. HAWLEY
BRADLEY, ARANT,
ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

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The City of Birmingham, Alabama submits this brief *Amicus Curiae* pursuant to United States Supreme Court Rule 36.4.

Interest of the Amicus Curiae

The City of Birmingham is well suited to assess the arguments presented in this case. Unlike the historic discrimination in the Alabama Department of Public Safety (hereinafter referred to as "Alabama DPS"), Birmingham's past ignoble history in race relations is well known. Further, the City's awakening to its obligations of non-discrimination was brought about only through prodding by the federal government and by extensive litigation. Recently, however, Birmingham has changed both racial attitudes and stratified municipal employment patterns. Birmingham's progress, in large part, is attributable to the successful implementation of affirmative action goals in employment. Significantly, the City of Birmingham has recognized that its earlier grudging acceptance of affirmative action was misplaced pessimism. Through the growing representation of blacks in its municipal departments, those departments — especially fire and police — are better able to serve and protect all citizens of Birmingham in every neighborhood and community in the City.

Birmingham, like Alabama DPS, agreed in a conscientiously constructed consent decree (hereinafter referred to as "Birmingham Decree" and "Alabama DPS Decree," respectively) to race conscious affirmative action designed to remedy the pernicious effects of past discrimination against blacks. Like the Alabama DPS Decree, the Birmingham Decree has been challenged by white employees who, to a degree, are the certain beneficiaries of the City's past discriminatory policies.

In 1974, several blacks and an area NAACP chapter brought employment discrimination lawsuits against the Jefferson County Personnel Board (the local civil service system) and the City of Birmingham under Title VII of the Civil Rights Act of 1964, as amended. Subsequently, the Department of Justice also filed a Title VII pattern and practice action against

the City, other municipalities, and other governmental entities, charging them with pervasive race and sex discrimination in employment. The cases were consolidated in federal district court in Birmingham. Over the course of approximately seven years, some issues – involving applicant testing for entry level police and fire department jobs – were tried to conclusion; other issues were extensively prepared for litigation.

Prior to settlement of the actions, some of the issues pertaining to municipal employment were litigated in two separate trials. In 1977, the trial court ruled that tests used to screen and rank applicants for employment as police officers and firefighters discriminated against blacks. That decision was affirmed on appeal. *Ensley Branch of the N.A.A.C.P. v. Seibels,* 616 F.2d 812 (5th Cir), *cert. denied,* 449 U.S. 1061 (1980). In a second trial in 1979, other employment tests, qualifications and practices were challenged. Finally, with the active participation of the Department of Justice, all parties – the City, the Department of Justice, and the private plaintiffs – entered into negotiations to settle the lawsuits. Prior to an announcement of the decision of the 1979 trial, negotiations yielded a Court-approved consent decree, signed by the private plaintiffs, by the City of Birmingham, and by the Department of Justice, which became effective on August 21, 1981.

As its lynchpin, the Birmingham Decree includes an affirmative action program, the long-term goal of which is to remedy past discriminatory policies and to achieve a municipal work force whose percentages of whites, blacks and women are in reasonable proportion to the percentages of those groups in the labor force of Jefferson County. The Decree also provides interim goals that requires the City to use good faith in seeking to hire and promote qualified blacks and women, where available, to City jobs at rates from fifteen percent (15%) to thirty percent (30%) annually for women and that range from thirty-three percent (33%) to fifty percent (50%) annually for blacks. For the past four years, the City has complied with the Consent Decree goals to the extent that persons qualified for hiring or promotion were available. Because the Birmingham

Decree had goals – and not quotas – the City has never been compelled to hire or promote (and has never hired or promoted) any individual who was not qualified for a position.

In 1984 (ten years after the first suit against Birmingham was brought and three years after that litigation was settled by entry of the Consent Decree), Birmingham was sued, in several lawsuits, for alleged reverse discrimination by whites who charged that the Birmingham Decree, and Birmingham's implementation of that Decree, unlawfully deprived them of employment opportunities. Much to the surprise of Birmingham, the Justice Department intervened in vigorous support of the whites and challenged the City's implementation of the Birmingham Decree. In December of 1985, after a full trial in three consolidated actions pertaining to two of the City's departments, the district court rejected the claims of reverse discrimination, finding, *inter alia,* that although Birmingham considered race and sex in promotions, it did so pursuant to a valid consent decree. *In re: Birmingham Reverse Discrimination Employment Litigation*; 39 FEP Cases 1431 (BNA) (N.D. Ala. 1985). In upholding the lawfulness of the Consent Decree, the district court followed the precedent of the Eleventh Circuit Court of Appeals which upholds race-conscious remedies that benefit persons not shown to be victims of discrimination, when the remedies are not imposed under circumstances that existed in *Firefighters Local Union No. 1784 v. Stotts,* 104 S.Ct. 2576 (1984), and otherwise comport with the guidance provided in *United Steelworkers v. Weber,* 443 U.S. 193 (1979). *Paradise v. Prescott,* 767 F.2d 1514 (11th Cir. 1985).

The results of the hiring and promotion goals in the Birmingham Decree are clear. The City of Birmingham is finally developing a municipal work force, particularly a police force and fire department, that reflects Birmingham's multiracial community. This reflection of Birmingham's pluralism gives municipal departments a much needed familiarity with the customs, standards and experiences that exist in the various communities in Birmingham and allows the City of Birming-

ham to render the quality of services that are necessary to serve the entire community. For example, the Birmingham Police Department currently has about one and one half times more blacks employed than at the time of the entry of the Decree. The number of black police sergeants has increased from *three* in 1981 to twenty-four in 1986. The number of black police lieutenants has increased from *zero* to three. The number of black police captains has increased from zero to two (promoted in last two years).

In the Birmingham Fire and Rescue Service, the number of blacks has almost doubled since the signing of the Decree. In the officer ranks of the Birmingham Fire Department, there are now thirteen lieutenants and two captains who are black. At the time of the Decree, there were no blacks employed above the entry level rank of firefighter.

The twenty percent (20%) black representation in the Birmingham Police Department and the twelve percent (12%) black representation in the Birmingham Fire & Rescue Service remain modest percentages for a city whose black population exceeds fifty percent (50%). But even those modest advances are almost entirely attributable to the employment goals and timetables which the Birmingham Decree directs the City of Birmingham to follow.

The issues in *United States v. Paradise* are, therefore, of vital interest to the City of Birmingham for a variety of reasons. First, this Court's ruling may affect the appeal now pending in the Eleventh Circuit Court of Appeals in the Birmingham Reverse Discrimination Litigation, as well as affect the outcome of two other reverse discrimination actions evolving from the Consent Decree promotions pending against the City of Birmingham in the trial court. Second, this Court's ruling may determine whether the Birmingham Decree, signed by Birmingham with the intent of putting behind it the many years of discriminatory employment practices, of rectifying the consequences of those practices, and of ending interminable litigation, will in fact have those intended effects. Third, this Court's ruling will amplify the teachings of the affirmative ac-

tion decisions of the 1985-1986 Term which reinforced the continued validity of affirmative action.

SUMMARY OF THE ARGUMENT

The United States Department of Justice has for years advocated and obtained court-ordered race-conscious and gender-conscious remedies in employment discrimination litigation without violating the Equal Protection Clause. The Department sought, authored and obtained such a decree in litigation with Amicus, the City of Birmingham, as well as with other jurisdictions and private employers across the country. The Department consistently contended in those actions that such remedies are constitutional as well as necessary to effectuate the purposes of Title VII.

The government argued in support of the lawfulness of and need for numerical race-conscious goals to this Honorable Court in the case of *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). In defending the lawfulness of such remedies, the government expressly contended that goals may benefit an entire class, even to the detriment of another class. The government's historical position in support of the precise kinds of numerical hiring and promotion goals contained in the Decree now before this Court, not its recent abandonment of that position, is entitled to considerable deference. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n. 4 (1977). Indeed, the traditional position is the legally correct position.

Race and gender conscious remedies do not violate the Equal Protection provisions of the 5th and 14th Amendments. As this Court stated in the last term, "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Wygant v. Jackson Board of Education*, No. 84-1340, slip op. at 12 (May 19, 1986). Such remedies are not unfair to non-minorities even if they benefit individuals not shown to have been victims of discrimination. Guidance provided by this Court in its previous decisions, including *United Steel-*

workers v. Weber and *Wygant v. Board of Education, supra,* assures that non-minorities do not unfairly bear the burdens of the affirmative action goals in a manner that would violate the Equal Protection Clause because such goals must be "narrawly tailored."

Further, the experience of the City of Birmingham and the Alabama DPS demonstrates that the numerical goals contained in their consent decrees were necessary to achieve meaningful employment and promotion opportunities for minorities in Alabama. *Amicus'* experience has also demonstrated that this achievement has not occurred at the expense of non-minorities. For example, most of the white plaintiffs in the Birmingham litigation have been promoted to the positions which they sought, and the delays in promotion have generally been approximately one year after the date on which the plaintiffs became eligible for (not entitled to) a promotion.

Finally, the experience of *Amicus* demonstrates the crucial need for an employer, particularly a public employer with finite resources, to be able to settle employment discrimination litigation on a basis that is fair to its employees, minorities and non-minorities alike, and that also relieves the employer of unwilling and costly participation in protracted litigation. The Consent Decrees signed by *Amicus* and by the Alabama DPS are such decrees and do not impose unconstitutional burdens on non-minorities.

ARGUMENT

I. The United States Department of Justice Had For Years Advocated Numerically Based Race-Conscious, Hiring and Promotion Goals as Lawful and Necessary

A. *The United States Obtained Numerically Based Race-Conscious Hiring and Promotion Goals with Birmingham*

The hidden agenda of the government — its plan to persuade courts to adopt as law the Department's abdication of affirmative action — is not immediately apparent from the govern-

ment's briefs in this pending case, but is abundantly clear from actions taken by the government in the Birmingham Reverse Discrimination Litigation. In the Birmingham cases, the government advocated and obtained the imposition of numerically based gender and race-conscious goals, remedies considered by all parties and the court as plainly lawful, and vowed to defend the Decree against collateral attack. However, since the change of administration at the Justice Department, the government has led the attack on the Decree by proffering a convoluted and strained construction of the Birmingham Decree that is plainly contrary to its express wording and the parties' intentions.

The Birmingham Decree contains gender-specific hiring and promotion goals that permit, and indeed compel, Birmingham to hire and promote qualified minorities in preference to non-minorities. For example, the interim relief provided in the Birmingham Decree requires the City to fill fifty percent (50%) of certain vacancies in the police and fire departments with blacks who are qualified and available for employment and to promote qualified blacks to subsequent vacancies in higher level positions at twice the percentage of blacks in the positions from which promotions are traditionally made.[1] While the Decree does not compel Birmingham to hire or promote an unqualified or less qualified minority in preference to a person who is "demonstrably better qualified based on the results of a job related selection procedure,"[2] it does not otherwise permit Birmingham to prefer a qualified white male over a qualified, but arguably less qualified, minority if doing so would prevent Birmingham from meeting prescribed hiring or promotional ratios. The Decree, therefore, contemplates that in some instances whites who are qualified for employment will be passed

[1]Other similar percentages and ratios are prescribed for female promotions and for blacks and females hired into entry-level jobs.

[2]Paragraph 2 of the decree reads, in pertinent part: "Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer or promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure."

over by blacks who are at least minimally qualified for promotion.

At the hearing held in 1981 to determine the fairness of the proposed Birmingham Decree, this matter was directly addressed when the Decree was explained as requiring preferential treatment of qualified minorities over more qualified nonminorities. The government unequivocably represented this feature of the Decree to be lawful.[8] When the Decree was challenged in court by white employees of the City Engineering Department, the Justice Department filed, on October 12, 1982, a motion to dismiss the challenge or alternatively a motion for summary judgment in favor of the City of Birmingham and other defendants. The Justice Department maintained that the white plaintiffs' action "constitute[d] an impermissible collateral attack on the lawfully entered Consent Decrees" entered into by the United States and the City of Birmingham and the Jefferson County Personnel Board. United States' Motion to Dismiss or Alternatively Motion for Summary Judgment, *Birmingham Association of City Employees v. Arrington*, No. CV-82-P-1852-S (N.D. Ala. filed Oct. 12, 1982) (later consolidated with other actions *In re: Birmingham Reverse Discrimination Employment Litigation, supra*).

Two years later, however, the Justice Department made known its intention to intervene in reverse discrimination lawsuits as a party plaintiff against the City of Birmingham thereby aligning itself with white private plaintiffs who were challenging the modest promotions made pursuant to the affirmative action goals of the Birmingham Decree. Paradoxically, however, despite its stated intention to intervene as a party plaintiff and contest promotions made pursuant to the Decree's goals, the Justice Department also vowed that the United States intended "vigorously to defend the validity of those Consent Decrees and to defend the validity of any remedial measures re-

[8]The Justice Department's representative stated: "We believe to the extent that the two decrees contain affirmative hiring goals and promotion goals for blacks and women, that these goals are lawful, that they do not unlawfully discriminate against whites." *Id.* at 40.

quired by those Consent Decrees." Hearing *Wilks v. Arrington*, No. CV-83-AR-2116-S and *Zannis v. Arrington*, No. CV-83-AR-2480-S (N.D. Ala. Feb. 28, 1984) (later consolidated with other actions. *In re: Birmingham Reverse Discrimination Employment Litigation, supra*) at 29. The City of Birmingham continues to be perplexed by the Justice Department's contradictions.

Even now, after years of litigation, after a trial, and after a judgment for the City of Birmingham, the City remains confused by the Justice Department's interpretation of the Birmingham Decree, which requires the Department to defend the Decree against collateral attack. The Department's contradictory intervention on behalf of white plaintiffs coupled with its cynical vow to defend the Decree according to the dictates of paragraph 3 still astonish the City of Birmingham. The present view of the government is a repudiation of its long-time role in securing compliance with Title VII through goals and timetables. This view does not represent a colorable reconsideration of statutory construction or of the intent of Congress when Title VII was enacted, but rather represents nothing more than the political stance of the current Justice Department.

In inviting this Court to accept its narrow view of permissible remedies under the United States Constitution, the government implicitly suggests that its present interpretation of the Constitution is the Department's long-standing interpretation. However, for years (and as recently as August, 1981, when the Birmingham Decree was entered), the Justice Department actively sought, obtained and defended the remedies it now contends are unlawful.

The Birmingham litigation is just one of dozens of similar actions across the country in which the government obtained numerical race-conscious remedies of the kind imposed in the cases now before this Court. Indeed, the Civil Rights Commission in 1972 credited the Civil Rights Division of the Justice Department for having brought or participated as "the Amicus in the cases resulting in landmark decisions sustaining

the use of numerical goals and timetables as a remedy for past discrimination." 1972 Civil Rights Commission Report 277 n. 76. *See, e.g., United States v. Local 86, Ironmakers,* 443 F.2d 544, 553 (9th Cir. 1971). This historical role of the government reflects an interpretation that warrants the deference normally accorded a governmental agency charged with the statutes' enforcement. *Nashville Gas Co. v. Satty,* 434 U.S. at 142 n. 4.

B. *The United States Advocated Numerical Remedies As Lawful and Necessary Before This Honorable Court*

Just as the United States, by way of hindsight, developed a strained interpretation of the Birmingham Decree which differed from the government's interpretation at the time of signing, the United States has recently developed and is now proposing to this Court a view of Title VII and of Congressional intent that differs from the position it previously took in this Court.

In its brief before this Court in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), the government painstakingly explained that numerical race-conscious remedies were both lawful and necessary. While *Weber* involved a voluntary affirmative action plan, as opposed to one imposed by a court, the government in *Weber* did not confine its defense of affirmative action to such voluntary plans. In 1979 the government represented to this Court:

> The legislative history of Title VII establishes that *numerical race-conscious measures,* such as the Gramercy training programs, were contemplated as appropriate relief for courts to grant if they were necessary to remedy proven discrimination. And even without an admission or finding of discrimination, the same program could have been incorporated into a consent decree in settlement of litigation.

Brief for the United States and the Equal Employment Opportunity Commission in *United Steelworkers of America v. Weber,* (Jan. 30, 1979) (hereinafter "U.S.A./E.E.O.C. *Weber* brief") at 18-19. (Emphasis added). Noting that consent de-

crees "commonly contain affirmative action obligations, including goals and timetables" and that the validity of such decrees is "not undermined by disclaimers of past discrimination," the government insisted in its *Weber* brief that affirmative action could include numerical goals.

In 1979, the government understood Title VII's legislative history as permitting race-conscious goals and Section 706 (g) as not intended to prohibit numerical remedies. The government explained that the concern raised by *some* Congressmen that the Act would require the use of quota systems led to assurances by the Act's sponsors that the Act did not require employers to maintain racially balanced work forces. These assurances, however, "did not suggest restrictions on remedies that could be ordered after a finding of discrimination." U.S.A./E.E.O.C. *Weber* brief at 29. Rather, Congress intended to preserve management prerogatives to the fullest extent possible, *in the absence of discrimination*. As explained by the government in 1979, "the last sentence of Section 706 (g) simply stated that a court could not order relief under the authority of the Act if employers took action against employees or applicants on grounds other than those prohibited by the Act" and "did not in any way restrict the scope of the remedies [such as race-conscious numerical goals] that could be ordered for the kinds of discrimination prohibited by the Act." U.S.A./E.E.O.C. *Weber* brief at 30-31.

The government's extensive review of the legislative history of the 1972 amendments to Title VII led it to conclude, in 1979, that "[a]ny doubts that Title VII authorized the use of race-conscious remedies were put to rest with the enactment of the Equal Employment Opportunity Act of 1972. . . ." U.S.A./E.E.O.C. *Weber* brief at 31. As noted by the government, Congress in 1972 was aware of the numerous court decisions ordering or upholding numerical relief as a remedy for violations of Title VII, and expressly stated its intent, in the Act's section-by-section analysis, to continue that case law. U.S.A./E.E.O.C. *Weber* brief at 32-33, 34 n. 17 (citing such cases in 5th, 7th, 8th and 9th circuits and citing S. Rep. No.

92-415, 92d Cong., 1st Sess. at 21, 27-28 (1971); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. at 8, 13 (1971); 118 Cong. Rec. 1664-1676, (1972)).

Senator Javits opposed a proposed amendment to restrict federal agencies from ordering the use of numerical ratios in hiring, arguing that such a restriction "would deprive the courts of the opportunity to order affirmative action under Title VII . . . in order to correct a history of unjust and illegal discrimination . . ." and "would torpedo orders of courts seeking to correct a history of unjust discrimination . . . because it would prevent the court from ordering *specific measures* which would assign specific percentages of minorities that had to be hired. . . ." *Id.* at 1665, 1667, cited in U.S.A./E.E.O.C. *Weber* brief at 33-34. (Emphasis added). The government further noted that the other co-floor leader, Senator Williams, also opposed any prohibition of numerical relief because such a prohibition "would strip Title VII . . . of all its basic fiber." 118 Cong. Rec. 1676 (1972) (cited in U.S.A./E.E.O.C. *Weber* brief at 34).

According to the government, these views "prevailed in the Senate" and "were shared by the House."

> In light of Congress's keen awareness of the kinds of remedies courts had been granting in Title VII cases, and in light of the protests from Senator Ervin and others over the use of race-conscious remedies, this amendment to Section 706(g) provides substantial support for the proposition that Congress intended that *numerical, race-conscious* relief is available under Title VII to remedy employment discrimination.

U.S.A./E.E.O.C. *Weber* brief at 35. (Emphasis added).

The government's long-standing construction of Title VII as permitting a court to impose race-conscious remedies, evidenced by its securing such relief in countless actions, including Birmingham's litigation, and by its brief in *Weber*, is entitled to considerable deference. The government's recently-contrived construction of legislative history is nothing more than a re-

trenchment motivated by its present policies that are antagonistic to the purpose and intent of Title VII.

Unless this Honorable Court reaffirms its approval of affirmative action as approved in *Weber*, and explicitly approves the actions of its lower courts in imposing numerical race-conscious remedies where necessary to remedy past discrimination, it will send a fateful message to the government and to individuals who are, or may be, subject to discrimination. That message will sound the death knell of Title VII in all but the most narrow of circumstances, as it would encourage the government to dismantle all progress gained through years of vigorous enforcement of Title VII.

II. The Court's Equal Protection Analysis Would Allow For One-To-One Promotions

A. *All Analyses Depend on the Severity of the Wrong to be Corrected*

This Court has consistently "recognized that government bodies constitutionally may adopt racial classifications as a remedy for past discrimination." *Sheet Metal Workers v. EEOC*, No. 84-1656, slip op. at 54; *Wygant v. Jackson Board of Education*, No. 84-1340, slip op. at 6; *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *University of California Regents v. Bakke*, 438 U.S. 265 (1978); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Court has not agreed, however, on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures. *See Wygant, supra*, at 5 (opinion of Powell, J.) (Means chosen must be "narrowly tailored" to achieve "compelling government interests"); *id.*, at 1 (O'Connor, J., concurring); *id.*, at 7 (Marshall, J., dissenting); *id.*, at 8 (Stephens, J., dissenting) (Public interest served by racial classification and means pursued justify adverse effects on the disadvantaged group); *Fullilove, supra*, at 491 (opinion of Burger, C. J.) (racial preference subject to "a most searching examination"); *id.*, at 519 (Marshall, J., concurring in the judgment) (remedial use of race

must be substantially related to achievement of important governmental objectives); *Sheet Metal Workers v. EEOC*, slip op. at 54-55.

In the case at bar, the district court's one-to-one promotion remedy satisfies any of the Supreme Court's yardsticks for measuring appropriate race conscious remedial measures. As this court noted in *Sheet Metal Workers v. EEOC*, "a court may have to resort to race-conscious affirmative action when confronted with an employer or labor union that is engaged in persistent or egregious discrimination. Or, such relief may be necessary to dissipate the lingering effects of pervasive discrimination." *Sheet Metal Workers v. EEOC*, slip op. at p. 50. The discrimination practiced by the Alabama Department of Public Safety, even after the 1972 court order, at best, illustrates "the lingering effects of pervasive discrimination;" more likely, and more realistically, the employment figures of the Alabama Department of Public Safety show "persistent or egregious discrimination," justifying race-conscious affirmative action.

Even under this Court's strict scrutiny analysis, the one-to-one promotions in the case at bar are a reasonable remedy, given the evidence of prior discrimination. A district court must have the flexibility to order all remedies necessary to correct constitutional violations – particularly violations as egregious as those in the Alabama Department of Public Safety and the City of Birmingham.

The Supreme Court has long recognized that

> [t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-

330 (1944)). "It is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." *Swann, supra,* 402 U.S. at 16. This Court has also noted the importance of judging the significance of the constitutional violation, and tailoring the remedy to fit the violation. "Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation'." *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420 (1984) (quoting *Milliken v. Bradley,* 418 U.S. 717, 744 (1974)). Thus, this Court must consider the extent to which the Alabama Department of Public Safety discriminated against blacks in employment.

Even the United States, in its brief in *Johnson v. Transportation Agency, Santa Clara County,* 85-1129 (October Term 1986), admits:

> One cannot know what is necessary as a remedy until one develops a concept of the wrong to be corrected. While mathematical precision may not be possible in such matters, it is possible generally to direct remedies at identified areas of discrimination, and to shape them in a way *commensurate with the duration and pervasiveness of discrimination.*

U.S. Brief at p. 21. (Emphasis added).

The City of Birmingham supports Respondent in this action and maintains that the one-to-one promotion ordered by the District Court in 1983 does not violate the Equal Protection Clause by classifying impermissibly along racial lines. *Amicus* maintains that the one-to-one promotions, while not a necessary remedy for employment discrimination violations, is absolutely essential to overcome the pernicious effects of deeply rooted employment discrimination in the Alabama Department of Public Safety.

This Court's equal protection analysis of racial classifications follows a two-pronged test. Under the most stringent analysis, the Court must first find that the racial classification "must be justified by a compelling governmental interest." *Wygant v. Jackson Board of Education,* No. 84-1340, slip op. at 5 (May

19, 1986); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Second, the means chosen "must be narrowly tailored to the achievement of that goal." *Id.* at 5; *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980).

The existence of societal discrimination alone is not a sufficiently compelling governmental interest to justify a racial classification. "Rather, the [Supreme] Court has insisted upon *some showing* of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, slip op. at 6. (Emphasis added). Such a showing of prior discrimination may be made in several ways. For example, this Court has held that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern of [sic] practice of discrimination." *Hazelwood School District v. United States*, 433 U.S. 299 (1977) (quoting *Teamsters v. United States*, 437 U.S. 324, 339 (1977)). Consequently, the *Wygant* Court concluded that "*Hazelwood* demonstrates this Court's focus on *prior discrimination* as the justification for, and the limitation on, a state's adoption of race based remedies." *Wygant*, slip op. at 6. (Emphasis added).

B. *Discrimination Against Blacks in Alabama Has Been Notorious*

As this Court well knows, the history of discrimination against blacks in the State of Alabama is deeply rooted and has permeated the social fabric of society. Employment patterns, along racial lines are the product of the social fabric. Federal court cases coming out of Alabama have played a prominent and distinctive role in overcoming such deep-seated segregation. Based on the cases that have come to this Court from Alabama courts, the Supreme Court should well understand that strong efforts were necessary to overcome both *dejure* and *de facto* segregation in Alabama. *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (City parade permit ordinance poses unconstitutional restraint on First Amendment rights of Civil Rights

demonstrators); *Lee v. Washington,* 390 U.S. 333 (1968) (Alabama statute requiring segregation in jails and prisons ruled unconstitutional); *Katzenbach v. McClung,* 379 U.S. 294 (1964) (Title II of The Civil Rights Act of 1964, forbidding racial discrimination by restaurants serving interstate travelers, is a constitutional exercise of the Commerce Clause); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960) (Gerrymandered voting districts are an unconstitutional infringement on blacks' right to vote); *NAACP v. Alabama,* 357 U.S. 449 (1958) (NAACP protected from disclosing names and addresses of its members based on Fourteenth Amendment right of members to pursue private interests and to associate with others); *Norris v. Alabama,* 294 U.S. 587 (1932) (Exclusion of blacks from grand jury is ruled unconstitutional as a violation of the 14th Amendment).

In addition, the Eleventh Circuit Court of Appeals has, on many occasions, addressed pervasive and notorious racial discrimination in employment in Alabama. Successful employment discrimination lawsuits have been instituted in recent years against major industries in the State: *e.g. Pullman Standard v. Swint,* 456 U.S. 273 (1982); *James v. Stockham Valve Co.,* 559 F.2d 310 (5th Cir. 1977), *cert. denied,* 434 U.S. 1034 (1978); *U.S. v. Allegheny-Ludlum Industries,* 546 F.2d 1249 (5th Cir. 1977); *Cotton v. Hinton,* 559 F.2d 1326 (5th Cir. 1977); *U.S. v. Hayes International Corp.,* 456 F.2d 112 (5th Cir. 1972).

The state government and its agencies, such as the Alabama Department of Public Safety, as well as Alabama municipalities, including the City of Birmingham, did little to overcome years of official discrimination against blacks. To the contrary, most governmental units within the State took action to preserve segregation in virtually every aspect of life. This Court has noted:

> [t]he attitude of the city administration [Birmingham's] in general and of its Public Safety Commissioner, in particular, are a matter of public record, of course and are familiar to this Court from previous litigation. . . . The

> United States Commission on Civil Rights found continuing abuse of civil rights protestors by the Birmingham Police, including use of dogs, clubs, and fire hoses.

Walker v. Birmingham, 388 U.S. 307, 325 n. 1 (1967) (Warren, C. J., dissenting). Further, when a federal court ordered the City of Birmingham to desegregate its park and recreation programs in 1962, the City Commission chose instead to close its 68 parks, 38 playgrounds, 6 swimming pools, and 4 golf courses. Such attitudes on the part of governmental leaders made it particularly difficult for blacks to gain meaningful employment as public servants within the State of Alabama. Consequently, when affirmative action remedies were necessary to overcome past discrimination, these remedies, by necessity, had to include more than "good faith" promises to increase minority employment. Instead, affirmative action required more precise mathematical ratios so that actual progress could be measured against a dismal past.

C. *Strong Remedies to Overcome Discrimination Need Not Bar Completely the Advancement of Whites*

This Court has stated on several occasions that public employers "operate under two interrelated constitutional duties. . . . First, they are under a duty to eliminate every vestige of racial segregation and discrimination . . . [and second, to] do away with all governmentally imposed distinctions based on race." *Wygant v. Jackson Board of Education*, No. 84-1340, slip op. at 8 (May 19, 1986). "These related constitutional duties are not always harmonious; reconciling them requires public employers to act with extraordinary care." *Id.*

Further, the Court recognizes that "in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this nation's dedication to eradicating racial discrimination, *innocent persons may be called upon to bear some of the burden of the remedy.*" *Id.* at 12. (Emphasis added).

Clearly, this Court has determined that the use of affirma-

tive action plans to overcome the effects of prior discrimination against blacks is entirely consistent with the Constitution. This Court has measured the level of the burden upon white employees in deciding whether unconstitutional burdens have been imposed upon white employees to remedy previous constitutional violations against minorities. For example, the *Wygant* Court found that the adverse effects of laying off white workers to maintain a racial balance in the work force imposed the "entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." *Wygant* at 14-15. Therefore, the Court held that such layoff relief was not sufficiently narrowly tailored and therefore failed to satisfy the demands of the Equal Protection Clause.

On the other hand, the *Wygant* Court stated that hiring goals sufficiently spread the imposition of the burden among whites so that a constitutional violation did not exist. The Court reasoned that "[t]hough hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a *future employment opportunity* is not as intrusive as loss of an existing job." *Wygant* at 14. (Emphasis added).

United Steelworkers v. Weber, 443 U.S. 193 (1979), though not an Equal Protection case, weighed four factors to determine that the Kaiser-USWA affirmative action plan was a "permissible" plan under Title VII. The Court found: (1) that the Kaiser plan was "designed to break down old patterns of racial segregation and hierarchy . . ." (2) that "the plan does not unnecessarily trammel the interests of the white employees" (3) that the plan does not "create an absolute bar to the advancement of white employees . . ." and (4) that "the plan is a temporary measure . . ." that would "end as soon as the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force."

These four *Weber* factors bear a resemblance to the Equal Protection analysis offered by the *Wygant* Court. The *Wygant* Court, for example, approved hiring goals but forbade layoffs, echoing the *Weber* Court's concert that affirmative action plans

not unnecessarily trammel the interests of whites. Clearly, layoffs constitute loss of an existing job. In contrast, hiring goals, and by logical extension, promotion goals for minorities affect only future employment opportunities and provide for continued hiring and promotional opportunities for white employees.

As stated, *supra*, the experience of *Amicus* conforms to this analysis. The delays in promotion incurred by the white plaintiffs from the time at which they became eligible for promotion has been of approximately one year's duration. Without a doubt, there is no "absolute bar" to a white employee's promotion. Further, the extent to which the whites' interests are "trammelled" is minimal because the burden is on future employment opportunities and is spread among all whites; moreover, the fact that the whites were hired when there were few or no black employees, reduces to nil the extent to which the whites' interests have been "trammelled."

III. Numerical Remedies Are Appropriate and Are Necessary to Effectuate the Goals of Title VII and Are Not Unfair to Individuals Not Benefited By Them

A. *The Birmingham Decree was Critical to the City's Assuring Equal Employment*

The mandate for race-conscious remedies in this case can be demonstrated by Birmingham's employment history before and after entry of its consent decree. As of January 1, 1966, Birmingham had a total of 9 black employees out of a total of 1,689 employees in its classified service, which consists of higher paying jobs. On the other hand, the unclassified service, which consists primarily of lower paid casual laborers, was predominantly black. In January, 1975, the year the Justice Department sued Birmingham for employment discrimination, the City had only 155 black classified employees out of a total classified workforce of 2,223 persons. The unclassified service remained predominantly black.

The 1979 trial in the *United States v. Jefferson County* litigation confirmed that until relatively recent times, blacks were

excluded from the Birmingham Fire Department as a matter of policy. "White only" restrictions were included in Personnel Board job announcements for firefighter positions with the City, as well as many other classified service jobs, at least until 1958. Even after these restrictions were removed from the announcements, the Birmingham Fire Department remained all white (except for unclassified laborers) until 1968 when the first black was hired as a firefighter.

When the Birmingham Decree was presented to the Court for approval, only 42 (9.3%) of the City's 453 firefighters were black. At no time prior to entry of the Decree had any of the lieutenants, captains or battalion chiefs in that Department been black. The total exclusion of blacks from supervisory positions and their relatively small numbers in the rank of firefighter stood in stark contrast to the City's civilian labor force, 36.5% of which was black according to the 1970 Federal Census.

In short, the history of discrimination both in society in general and in the field of public employment in the City of Birmingham has been of longstanding duration and has required strict and strong measures to overcome. The Birmingham Decree expressly conditions the hiring and promotion of blacks pursuant to the Consent Decree upon their being "qualified" for the positions which they seek. In the 1985 trial, the district court found that "the [hiring and promotion] goals referred to above and set out in paragraph 5, 6 and 8 of the City decree are expressly made subject to the availability of qualified black applicants . . ." findings of fact 123, adopted by the court, Tr. at p. 1347. Thus, the Birmingham Decree did not endanger public safety by promoting unqualified candidates. On the contrary, the City has found that its experience in hiring and promoting blacks within its departments has borne out its belief that City departments, particularly the police and fire departments, are more readily accepted by the community and are more clearly representative of the diverse society which they serve. Justice Stevens recognized in *Wygant* that a racially diverse police department is more likely to be accepted, and therefore effective (particularly in potentially racially explo-

sive situations). *Wygant v. Jackson Board of Education*, 84-1340, slip op. at 3 (May 19, 1986) (Stevens, J., dissenting).

In July, 1981, just before entry of the Birmingham Decree, the effects of past discrimination against blacks persisted in Birmingham's police and fire departments — notwithstanding the district court's race-conscious order in 1977 requiring consideration (but not otherwise requiring *selection*) of more blacks in these departments, and despite Birmingham's adoption of *voluntary* affirmative action plans. *United States v. Jefferson County*, 28 FEP Cases 1834 (BNA) (N.D. Ala. 1981) *aff'd*, 720 F.2d 1511 (11th Cir. 1984). As of July 21, 1981, 79 of Birmingham's 480 police officers were black, 3 of its 131 police sergeants were black, and none of its 40 police lieutenants and captains was black. In the fire department, 42 of the 453 firefighters were black, and none of the 140 lieutenants, captains and battalion chiefs was black. *Id.*

Clearly, the mere elimination of the long-standing barriers to employment of blacks and females — something that had already been accomplished before entry of the Birmingham Decree — was inadequate to remedy the effects of such pervasive historical discrimination. Real progress in overcoming past discrimination came about only with the imposition of numerical goals in the Birmingham Decree. Since entry of the decree in 1981, opportunities for blacks and females have been enhanced, though not at the expense of qualified white males. In the four years after entry of the decree, Birmingham made 50 police sergeant promotions — 27 white and 23 black; 38 male and 12 female. Of 10 lieutenant promotions, 7 were white and 3 black; 9 were male and 1 was female. In the Fire and Rescue Service, there were 29 fire lieutenant promotions, 17 white and 12 black. Of the 10 captain promotions, 9 were black and 1 white.

Absent the Consent Decree, this modest progress would not have been made. It is the only mechanism available to the City to assure equal employment opportunity.[6] Yet, without the

[6]This is particularly true since the civil service system under which Birmingham operates places the responsibility for testing and identifying

Consent Decree, Birmingham would be subject to new charges of race and sex discrimination, especially given the nature of an archaic civil service system, which traditionally has been a powerful lobby for the status quo.

B. *One-to-One Promotion Goals Are Necessary to Overcome Discrimination in the Alabama DPS*

It is equally apparent that the race-conscious remedies imposed by consent decree upon the Alabama Department of Public Safety were necessary and appropriate remedies to overcome the effects of past discrimination. Department custom and practice effectively prevented blacks from joining or advancing within the state troopers division. Through the Alabama DPS Decree, however, the Alabama Department of Public Safety, like the City of Birmingham, has made progress in providing equal employment.

The various findings of the district court in *Paradise v. Prescott* lead to an inescapable conclusion: the prior discrimination against blacks by the Alabama Department of Public Safety has been blatant, long-term, and is largely unremedied. In 1972, noting that with the 37 year existence of the Alabama Department of Public Safety there had never been a black state trooper, the district court found "*without contradiction* that the defendants have engaged in a *blatant and continuous* pattern and practice of discrimination in hiring in the Alabama Department of Public Safety." *NAACP v. Allen*, 340 F. Supp. 703, 705 (M.D. Ala. 1972). (Emphasis added). Based on its finding the court ordered the Department to employ one black trooper for every white trooper hired until 25% of the force was black. *Id.* at 706.

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qualified candidates with an independent entity, the Jefferson County Personnel Board, which is subject to a separate consent decree entered contemporaneously with Birmingham's Decree. Without the race-conscious remedies in the Board's decree, namely the requirement that candidate certifications include sufficient numbers of minorities to enable Birmingham to meet its goals, Birmingham would have no mechanism -- as none is provided under state law -- to assure that minorities are even considered for a given job.

Seven years later, the Alabama Department of Public Safety asked for a clarification of the 1972 order petitioning the court on the question of whether the 1972 order required one for one hiring until the entry level rank of the department was 25% black or whether the order required 25% of the entire force to be black. Astonished, the district court noted that "[o]n this point, there is no ambiguity." *Paradise v. Shoemaker*, 470 F. Supp. 439, 440 (M.D. Ala. 1979). Further, the court specifically noted that "out of 232 state troopers at the rank of corporal or above, *there is still not one black*." *Id.* at 442. (Emphasis in original). The court added: "To focus only on the entry level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest." *Id.* at 442.

Finally, after consent decrees in 1979 and 1982 that included provisions that required the Alabama Department of Public Safety to develop departmental promotion procedures without adverse racial impact, the respondent filed a motion to enforce the provisions of the decrees. The court noted that about twelve years had elapsed since the 1972 order, but that the Alabama Department of Public Safety still had no black majors, no black captains, no black lieutenants, no black sergeants, and only four black corporals. *Paradise v. Prescott*, 585 F. Supp. at 74. Further, the court found that "the department still operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons." *Id.* at 74.

As the district court noted in 1972, the prior discrimination in the Alabama DPS is "without contradiction." 340 F. Supp. at 705. The various findings of the district courts certainly satisfy this Court's requirement that "*some showing* of prior discrimination by the governmental unit" be made. *Wygant*, slip op. at 6. (Emphasis added). Further, the evidence of prior discrimination is even more clearly shown by the *Hazelwood* standard, that "[w]here gross statistical disparities can be shown, they alone may constitute *prima facie* proof . . . of discrimina-

tion." *Hazelwood School District v. United States*, 433 U.S. 299, 307-308 (1977).

Without a doubt, the Alabama Department of Public Safety has discriminated against blacks. Further, because the government has a "compelling interest in remedying past discrimination," *Sheet Metal Workers v. EEOC*, No. 84-1656, slip op. at 55 (July 2, 1986), the Court must examine the second prong of its Equal Protection analysis.

This Court has cited approvingly the use of numerical goals as an affirmative action remedy. During the 1985 term, the Court stated that "the use of numerical goals provides a compromise between two unacceptable alternatives: an outright ban on hiring or promotions, or continued use of a discriminatory selection procedure." *Sheet Metal Workers v. EEOC*, slip op. at 25. In the case at bar, the district court was clearly faced with these two "unacceptable alternatives."

Both petitioners and respondents agree with this Court, that "in most cases, the court need only order the employer or union to cease engaging in discriminatory practices." *Sheet Metal Workers v. EEOC*, slip op. at 23. The *Sheet Metal Workers* Court also noted, however, that numerical goals may be the only way to require "recalcitrant employers" to overcome previous discrimination. *Id.* "Further, even where the employer or union formally ceases to engage in discrimination, informal mechanisms may obstruct equal employment opportunities. An employer's *reputation for discrimination* may discourage minorities from seeking available employment." *Id.* at 24. (Emphasis added). See *Morrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir. 1974) (en banc), *cert. denied*, 419 U.S. 895 (1974).

Perhaps envisioning the appeal of the case at bar to this Court, the *Sheet Metal Workers* Court cited approvingly the Fifth Circuit's 1974 decision upholding the 1972 one-for-one hiring order in *Paradise*, saying "affirmative action 'promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise,

erected by past practices.' *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974)." *Sheet Metal Workers v. EEOC*, slip op. at 25.

Again, seemingly laying the groundwork for the case at bar, the *Sheet Metal Workers* Court maintained that "a district court may find it necessary to order interim hiring or promotional goals pending the development of nondiscriminatory hiring or promotion procedures. In these cases, the use of numerical goals provides the compromise between two unacceptable alternatives: an outright ban on hiring or promotions, or continued use of a discriminatory selection procedure." *Sheet Metal Workers v. EEOC*, slip op. at 25. The district court in *Paradise* was faced precisely with this situation in 1983. The evidence throughout the case had shown "a blatant and continuous pattern and practice of discrimination hiring." *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972). Further, promotional procedures required under the 1979 and 1981 Consent Decrees had virtually been ignored and "the department is still without acceptable procedure for an advancement of black troopers into this structure, and it does not appear that any procedure will be in place within the near future." *Paradise v. Prescott*, 585 F. Supp. at 74. Faced with the "two unacceptable alternatives," and realizing that "the defendants need additional corporals and that they need at least fifteen of them as soon as possible," *Paradise v. Prescott*, 580 F. Supp. 171, 173 (M.D. Ala. 1983), the district court fashioned a remedy that was tailored to achieve its purpose: to promote black state troopers to the ranks of officers within the Alabama Department of Public Safety.

Reviewing the record of twelve years of court orders, appeals, and two consent decrees, it was clearly evident that the only successful remedy throughout the whole period of litigation had been the district court's original 1972 order requiring one-for-one hires within the department. Based on the recalcitrance of the Alabama Department of Public Safety to move beyond the strict interpretation of the order requiring one-for-one hires, the district court ordered one-for-one promotions until 25% of the officers in the ranks of the Alabama Department

of Public Safety were black. *Paradise v. Prescott*, 585 F. Supp. at 75.

C. *Race-Conscious Remedies Are Fair to White Employees*

Notwithstanding the emotional outcries of the present administration, race-conscious remedies of the kind challenged by petitioners are not unfair to members of the historically favored race. Since race-conscious remedies are imposed to eradicate the effects of historical discrimination, such remedies will not unfairly injure third parties if the remedies are carefully constructed to integrate the disadvantaged class into the workforce to the degree that would have occurred absent discrimination. In many situations, one possible measure of the degree of minority participation in a non-discriminatory environment is the percentage of minorities in the community's labor force. When a white employee has *benefited* by the discrimination, it is not unfair to retard his future promotions to make way for blacks or women as long as the *number* of blacks or women hired does not exceed the relative *number* of blacks or women that would have been hired absent discrimination. The impact on the favored class members is the same whether the proven victims receive their rightful places or whether the same number of persons (potential though not proven victims) occupy those places.[8]

For example, the City of Birmingham has found that the burden imposed upon white employees in the promotion of

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[8]This argument was presented to this Court by the government in 1979 in its defense of voluntary affirmative action and applies equally to affirmative action incorporated in a court decree:

> Nor would the interests of white employees have been materially advanced if participation in the training program had been premised on the identification of particular blacks and women who had been victims of prior discrimination. The incumbent employees would be affected similarly by a remedy in favor of identifiable victims of specific discrimination as by a remedy that approximates that result by instead including a specified proportion of minority employees not so identified.

U.S.A./E.E.O.C. *Weber* brief at 58.

qualified blacks pursuant to the Birmingham decree, has been modest. Of the 17 white employees involved in the 1985 trial of the Birmingham Reverse Discrimination Litigation, 14 have been promoted to those positions to which they originally became eligible (not entitled), and for which they were passed over. The delays in the promotions which they eventually obtained ranged from 3 weeks to 220 weeks. The average delay in promotion was 62 weeks. These temporary delays in promotion are far outweighed by the need to remedy the effects of the City's past pervasive discrimination in public employment.

Further, the significance of the delays of the promotions of the white fire and engineering plaintiffs in the Birmingham Reverse Discrimination Litigation was minimal when one looks at the extent to which the white plaintiffs benefited from the City's previous discrimination in employment. Of the 17 white plaintiffs, 10 were hired by the City of Birmingham at a time when there were no black employees in the department in which the plaintiffs were employed and when the only competition for Fire Department jobs was among whites. Four of the white plaintiffs were hired by the City when there was 1 black employee in the department in which the whites were employed. Two of the white plaintiffs were hired at a time when there were 10 black employees in the department. Clearly, the white plaintiffs in the Birmingham Reserve Discrimination Litigation were the certain beneficiaries of the City's previous employment discrimination. This fact, coupled with the short duration of the delay in promotion of whites by the City pursuant to the City Decree minimizes the burden shared by whites in remedying the effects of prior discrimination. *See Wygant*, slip op. at 12; *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

Further, any concern that employers will bargain away rights of non-minority employees to avoid the expense of litigation is unwarranted. As long as the district court has the responsibility to assure that the numerical impact of the Decree's affirmative action provisions approximates the impact that non-discrimination would have had upon the favored class, then

non-minorities will not be injured. Moreover, in considering the fairness of any class action settlement, the district court should evaluate the fairness of the proposed settlement upon class members as well as upon employees who may be affected by the settlement. In evaluating whether settlement is fair and adequate, the district court should apply this Court's guidelines for voluntary affirmative action as first discussed in *Weber*. This approach is not novel, unmanageable, nor impracticable. It is the very approach followed routinely by district courts in approving consent decrees, including the district court in Birmingham's Title VII litigation, and by appellate courts in reviewing the appropriateness of race-conscious remedies whether imposed by consent decree or otherwise.

Thus, the legitimate interests of non-minorities are protected by the court when it considers whether race-conscious remedies are necessary and appropriate. Relevant to this determination is whether the relief is temporary and terminates when manifest racial imbalances are eliminated, whether there is evidence of historical discrimination, whether the discrimination was intentional, whether the relief does not unnecessarily trammel interests of whites by effectively barring their advancement or requiring their discharge and replacement with blacks, and whether beneficiaries of the relief are qualified for any employment opportunity conferred. *See Weber*, 443 U.S. at 208; *Paradise, supra*, 767 F.2d at 1527-34.

An employer's self-interest in limiting litigation costs by entering into consent decrees, therefore, does not threaten legitimate interests of incumbent employees. This Court's prior decisions in *Weber* and *Stotts* and the lower courts' role in assuring that race-conscious remedies comport with those decisions provide genuine protection to incumbent employees. Moreover, the employer's cost-consciousness is by no means an improper motivation for settlement. When the fact of discrimination is not a debatable matter, protracted litigation only perpetuates the discrimination, further entrenches its effects, delays relief to plaintiffs, and consumes financial resources that might otherwise be utilized to meet municipal obligations.

Birmingham readily admits that one of its incentives to enter into its Consent Decree was to avoid further protraction of litigation which was in its seventh year and had cost tens of thousands of dollars, yet was guaranteed to last many more years and cost thousands of more dollars before all issues covering all City departments were finally tried. That seemingly interminable litigation would have been successfully concluded by the 1981 consent decree had it not been for the irresponsible reading, by the government and by some reverse discrimination plaintiffs, of this Court's decision in *Stotts*. In the months since *Stotts* was decided, Birmingham has expended hundreds of thousands of dollars defending – from governmental and private challenge – the very remedies sought by the government and carefully approved by the court in 1981.

The City cannot believe that this Court intends to erect a barrier to settlement, or to deprive the lower courts of such a valuable tool to remedy effects of past discrimination regardless of the case's circumstances. Rather, clarification is needed to resolve a conflict between the lower courts, on the one hand, and the United States and private parties, on the other hand. By affirming the decisions below, this Court would preserve a necessary and lawful remedy under Title VII and the Fourteenth Amendment which courts have used successfully for many years.

CONCLUSION

For the reasons stated, the judgments of the Court of Appeals should be affirmed.

James K. Baker
Counsel of Record
City Attorney
CITY OF BIRMINGHAM
600 City Hall
Birmingham, AL 35203
(205) 254-2372

James P. Alexander
Richard H. Walston
Gregory H. Hawley
BRADLEY, ARANT,
ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500